

COMMUNICATION FROM THE ACP GROUP

Special & Differential Treatment and Technical Assistance and Capacity Building
in the Trade Facilitation Negotiations

The following communication, dated 27 October 2009, is being circulated at the request of the Delegations of the ACP Group.

**TEXTUAL PROPOSALS OF THE ACP GROUP REGARDING THE S&DT AND
TA/CB CHAPTER OF A FUTURE TRADE FACILITATION AGREEMENT**

The following textual proposals of the ACP Group constitute "work in progress" and do not prejudice any future position of the ACP Group in the negotiations on trade facilitation.

I. CHAPEAU OF S&DT CHAPTER

Comment by the ACP Group: The ACP Group is of the view that the provisions contained in the S&DT chapter of a future TF Agreement have to be interpreted in accordance with the principles laid down in Annex D of the 2004 July Framework Agreement.

"The provisions of this chapter shall be interpreted in light of the following guiding principles:

1. Least-developed country Members shall not be required to notify any provisions or sub-part of provisions under Category A.
2. Any implementation of provisions (or sub-part of provisions) notified or re-notified under Category C by developing and least-developed countries is conditional on the provision of adequate and effective technical assistance and capacity building measures by developed countries as well as the acquisition of implementation capacity by developing and least-developed country Members.
3. The provision of technical assistance and capacity building measures by developed country Members and relevant international organizations, including the IMF, OECD, UNCTAD, WCO and the World Bank, is a precondition for the acquisition of implementation capacity by developing and least-developed country Members in respect of provisions (or sub-part of provisions) notified or re-notified under Category C.
4. Annex D of the 2004 July Framework Agreement clearly states that "support and assistance should also be provided to help developing and least-developed countries

implement the commitments resulting from the negotiations, in accordance with their nature and scope".

5. In cases where technical assistance and capacity building measures are not provided or lacks the requisite effectiveness, developing and least-developed countries are not bound to implement the provisions (or sub-part of provisions) notified or re-notified under Category C.
6. Notwithstanding the peace clause, Members shall exercise due restraint in raising matters under the Understanding on Rules and Procedures Governing the Settlement of Disputes involving least-developed country Members."

II. DEFINITIONS

"For the purpose of this Agreement:

- (a) "Category A" means provisions or sub-part of provisions that a Member will implement upon the entry into force of the Agreement. Each developing country Member and least-developed country Member will determine which provisions or sub-part of provisions it will notify under Category A.
- (b) "Category B" means provisions or sub-part of provisions that a developing country Member or least-developed country Member will implement after the entry into force of the Agreement.
- (c) "Category C" means provisions or sub-part of provisions that a developing country Member or least-developed country Member will implement after the entry into force of the Agreement, the provision of adequate and effective technical assistance and capacity building measures by donors and the acquisition of implementation capacity.
- (d) "Notification of provisions or sub-part of provisions under Category B to the WTO" means the notification to the Trade Facilitation Committee of the provisions or sub-part of provisions that a developing country Member or least-developed country Member will implement after the entry into force of the Agreement.
- (e) "Notification of provisions or sub-part of provisions under Category C to the WTO" means the notification to the Trade Facilitation Committee of the provisions or sub-part of provisions that a developing country Member or least-developed country Member will implement after the entry into force of the Agreement, the provision of adequate and effective technical assistance and capacity building measures by donors and the acquisition of implementation capacity.
- (f) "Notification of the implementation plan for provisions or sub-part of provisions notified under Category B" means the notification to the Trade Facilitation Committee of the implementation plan for the provisions or sub-part of provisions that a developing country Member or least-developed country Member notified under Category B.
- (g) "Notification of the implementation plan for provisions or sub-part of provisions notified under Category C" means the notification to the Trade Facilitation Committee of the implementation plan for the provisions or sub-part of provisions that a developing country Member or least-developed country Member notified under Category C.

- (h) "Implementation plan for provisions or sub-part of provisions notified under Category B" means a plan that sets forth: (i) the period of time required for the acquisition of implementation capacity in respect of each provision or sub-part of provisions included in the plan; and (ii) the national agencies responsible for implementing the provisions or sub-part of provisions included in the plan.
- (i) "Implementation plan for provisions or sub-part of provisions notified under Category C" means a plan that sets forth: (i) the period of time required for the acquisition of implementation capacity in respect of each provision or sub-part of provision included in the plan; (ii) the technical assistance and capacity building measures required for the acquisition of implementation capacity in respect of each provision or sub-part of provisions included in the plan; (iii) the donors that agreed to provide the technical assistance and capacity building measures required for the acquisition of implementation capacity in respect of each provision or sub-part of provisions included in the plan; and (iv) the national agencies responsible for implementing the provisions or sub-part of provisions included in the plan.
- (j) "Early warning mechanism" means a procedure that a developing country Member or least-developed country Member may invoke in order to: (i) extend the period of time required for the acquisition of implementation capacity in respect of a provision or sub-part of a provision notified under Category B or Category C; or (ii) re-notify a provision or sub-part of a provision initially notified under Category B or Category C under a different Category.
- (k) "Notification of implementation" means a notification by a developing country Member or a least-developed country Member to the Trade Facilitation Committee that it has acquired implementation capacity for a provision or sub-part of a provision notified under Category B or Category C. The provision or sub-part of the provision covered by the notification will become legally binding on the date when the notification has been submitted to the WTO.
- (l) "Peace clause" means a provision that exempts developing country Members and least-developed country Members from any actions by another Member based on Articles XXII and XXIII of GATT 1994 and the Understanding on Rules and Procedures Governing the Settlement of Disputes for a given period of time after a provision or sub-part of a provision has become legally binding on the developing country Member or least-developed country Member concerned."

III. NOTIFICATION OF PROVISIONS (OR SUB-PART OF PROVISIONS) TO THE TRADE FACILITATION COMMITTEE

Comment by the ACP Group: The ACP Group would like to note that the notification of provisions (or sub-part of provisions) to the WTO serves the sole purpose of informing WTO Members to which of the three categories the notifying Member has attributed a given provision (or sub-part thereof). Notifications are not meant to provide any information relating to the implementation of these provisions (or sub-part of provisions). This latter information is to be provided, in a second step, only in the implementation plans for provisions (or sub-part of provisions) notified under Category B and Category C, respectively (see section IV below).

A. NOTIFICATION OF PROVISIONS (OR SUB-PART OF PROVISIONS) UNDER CATEGORY A

Developing Country Members

"Developing country Members shall notify to the Trade Facilitation Committee the provisions (or sub-part of provisions) under Category A at the time of the entry into force of the Agreement."

Comment by the ACP Group: It is the understanding of the ACP Group, based on Article 18 of the Vienna Convention on the Law of Treaties 1969, that WTO Members, once they have signed the future TF Agreement, are obliged to refrain from acts which would defeat the object and purpose of the Agreement prior to its entry into force. This should provide comfort to those Members which insist on a notification at the time of signature of the future TF Agreement. However, the ACP Group might be prepared to accept an inclusion of the concept "at the time of the signature of the Agreement", but only in addition to the concept "at the time of the entry into force of the Agreement".

Least-Developed Country Members

"Least-developed country Members may notify to the Trade Facilitation Committee the provisions (or sub-part of provisions) under Category A at the entry into force of the Agreement or, at the latest, by [X] time after the entry into force of the Agreement."

Comment by the ACP Group: The notification of provisions or sub-part of provisions by a least-developed country Member by [X] time after the entry into force of the Agreement means that such provisions or sub-part of provisions will be implemented only upon the date of notification and not upon the entry into force of the Agreement. Although this does not, strictly speaking, correspond to the definition of Category A, this option does not put into question the concept of Category A. This is because this option should be understood as a derogation in favour of least-developed countries that is intended to provide an incentive for these countries to notify provisions or sub-part of provisions under this particular Category.

B. NOTIFICATION OF PROVISIONS (OR SUB-PART OF PROVISIONS) UNDER CATEGORY B

Developing Country Members

"Developing country Members shall notify to the Trade Facilitation Committee the provisions (or sub-part of provisions) under Category B at [X] time after the entry into force of the Agreement."

Least-Developed Country Members

"Least-developed country Members may notify to the Trade Facilitation Committee the provisions (or sub-part of provisions) under Category B at [X] time after the time provided for developing country Members."

C. NOTIFICATION OF PROVISIONS (OR SUB-PART OF PROVISIONS) UNDER CATEGORY C

Developing Country Members

"Developing country Members shall notify to the Trade Facilitation Committee the provisions (or sub-part of provisions) under Category C at [X] time after the entry into force of the Agreement."

Least-Developed Country Members

"Least-developed country Members may notify to the Trade Facilitation Committee the provisions (or sub-part of provisions) under Category C at [X] time after the time provided for developing country Members."

IV. NOTIFICATION OF IMPLEMENTATION PLANS TO THE TRADE FACILITATION COMMITTEE

Comment by the ACP Group: The ACP Group takes the view that the notification of the implementation plans to the WTO serves the purpose of providing WTO Members with the essential minimum information regarding the implementation of provisions (or sub-part of provisions) notified under Category B and Category C, respectively. This information will differ depending on whether a provision (or sub-part of provision) has been notified under Category B or Category C, since these two categories are legally different.

A. NOTIFICATION OF IMPLEMENTATION PLANS FOR PROVISIONS (OR SUB-PART OF PROVISIONS) NOTIFIED UNDER CATEGORY B

Developing Country Members

"Developing country Members shall notify to the Trade Facilitation Committee the implementation plan for provisions (or sub-part of provisions) notified under Category B at [X] time after they submitted the notification of the provisions (or sub-part of provisions) under Category B."

Least-Developed Country Members

The ACP Group supports any additional flexibility for least-developed country Members.

B. NOTIFICATION OF IMPLEMENTATION PLANS FOR PROVISIONS (OR SUB-PART OF PROVISIONS) NOTIFIED UNDER CATEGORY C

Developing Country Members

"Developing country Members shall notify to the Trade Facilitation Committee the implementation plan for a provision (or sub-part of a provision) notified under Category C after an agreement with a donor has been reached to assist in the implementation of the provision (or sub-part of the provision) concerned."

Comment by the ACP Group: The issue of whether a developing country Member should submit one global implementation plan, covering all provisions or sub-part of provisions that it notified under Category C, after it has reached agreement with all donors on assistance for the implementation of all these provisions or sub-part of provisions, or several implementation plans, covering only the provision or sub-part of the provision for which an agreement has been reached with a donor to assist in the implementation of that provision or sub-part of that provision, is still under discussion within the ACP Group.

Least-Developed Country Members

The ACP Group supports any additional flexibility for least-developed country Members.

V. EARLY WARNING MECHANISM

A. PROVISIONS (OR SUB-PART OF PROVISIONS) NOTIFIED UNDER CATEGORY B

1. Additional Time for the Implementation of Provisions (or Sub-Part of Provisions) Notified Under Category B

"1. Any developing country Member, including any least-developed country Member, may extend the time required to implement a provision (or sub-part of a provision) notified under Category B. Any extension shall be notified to the Trade Facilitation Committee prior to the expiration of the date of implementation for the provision (or sub-part of the provision) concerned which was notified to the Trade Facilitation Committee.

2. Any developing country Member, including any least-developed country Member, that wishes to extend the time required to implement a provision (or sub-part of a provision) notified under Category B beyond the time extended and notified under the first paragraph, has to submit a request to the Trade Facilitation Committee prior to the expiration of the date of implementation, as extended and notified in accordance with the first paragraph. The Trade Facilitation Committee shall take a decision on the request, taking into account any specific circumstances of the Member submitting the request."

Least Developed Country Members

The ACP Group supports any additional flexibility for least developed country Members.

2. Re-Notification of Provisions (or Sub-Part of Provisions) Initially Notified Under Category B

"Any provision (or sub-part of a provision) initially notified under Category B may be re-notified under Category C. A re-notification of a provision (or sub-part of a provision) under Category C has to be notified to the Trade Facilitation Committee accordingly."

Least-Developed Country Members

The ACP Group supports any additional flexibility for least-developed country Members.

B. PROVISIONS (OR SUB-PART OF PROVISIONS) NOTIFIED UNDER CATEGORY C

1. Additional Time for the Implementation of Provisions (or Sub-Part of Provisions) Notified Under Category C

"1. Any developing country Member, including any least developed country Member, may extend the time required to implement a provision (or sub-part of a provision) notified under Category C. Any extension shall be notified to the Trade Facilitation Committee prior to the expiration of the date of implementation for the measure concerned which was notified to the Trade Facilitation Committee.

2. Any developing country Member, including any least-developed country Member, that wishes to extend the time required to implement a provision (or sub-part of a provision) notified under Category C beyond the time extended and notified under the first paragraph, has to submit a request to the Trade Facilitation Committee prior to the expiration of the date of implementation, as extended and notified to the Trade Facilitation Committee in accordance with the first paragraph. The Trade

Facilitation Committee shall take a decision on the request, taking into account any specific circumstances of the Member submitting the request."

Least-Developed Country Members

The ACP Group supports any additional flexibility for least-developed country Members.

2. Re-Notification of Provisions (or Sub-Part of Provisions) Initially Notified Under Category C

"Any provision (or sub-part of a provision) initially notified under Category C may be re-notified under Category B. A re-notification of a provision (or sub-part of a provision) under Category B has to be notified to the Trade Facilitation Committee accordingly."

Least-Developed Country Members

The ACP Group supports any additional flexibility for least-developed country Members.

VI. NOTIFICATION OF IMPLEMENTATION TO THE TRADE FACILITATION COMMITTEE

A. PROVISIONS (OR SUB-PART OF PROVISIONS) NOTIFIED UNDER CATEGORY B

"A provision or sub-part of a provision notified under Category B shall become legally binding only on the date when a developing country Member or a least-developed country Member submits a notification to the Trade Facilitation Committee that it has acquired implementation capacity for the provision or sub-part of the provision concerned."

Comment by the ACP Group: The ACP Group strongly believes that for reasons of legal clarity and transparency a notification of implementation is required in order for a provision or sub-part of a provision notified under Category B to become legally binding.

B. PROVISIONS (OR SUB-PART OF PROVISIONS) NOTIFIED UNDER CATEGORY C

"A provision or sub-part of a provision notified under Category C shall become legally binding only on the date when a developing country Member or a least-developed country Member submits a notification to the Trade Facilitation Committee that it has acquired implementation capacity for the provision or sub-part of the provision concerned."

Comment by the ACP Group: The ACP Group strongly believes that for reasons of legal clarity and transparency a notification of implementation is required in order for a provision or sub-part of a provision notified under Category C to become legally binding.

VII. PEACE CLAUSE

A. PROVISIONS (OR SUB-PART OF PROVISIONS) NOTIFIED UNDER CATEGORY A

"Developing country Members, including least-developed country Members, shall be exempt from any actions based on Articles XXII and XXIII of GATT 1994 and the Understanding on Rules and Procedures Governing the Settlement of Disputes for a period of [X] years after a provision (or sub-part of a provision) has been notified under Category A."

B. PROVISIONS (OR SUB-PART OF PROVISIONS) NOTIFIED UNDER CATEGORY B

"Developing country Members, including least-developed country Members, shall be exempt from any actions based on Articles XXII and XXIII of GATT 1994 and the Understanding on Rules and Procedures Governing the Settlement of Disputes for a period of [X] years after notification by a Member to the Trade Facilitation Committee that a provision (or sub-part of a provision) notified or re-notified under Category B has been implemented."

C. PROVISIONS (OR SUB-PART OF PROVISIONS) NOTIFIED UNDER CATEGORY C

"Developing country Members, including least-developed country Members, shall be exempt from any actions based on Articles XXII and XXIII of GATT 1994 and the Understanding on Rules and Procedures Governing the Settlement of Disputes for a period of [X] years after the notification by a Member to the Trade Facilitation Committee that a provision (or sub-part of a provision) notified or re-notified under Category C has been implemented."
